IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 214

MILLER MUSIC CORPORATION,

Petitioner,

against

CHARLES N. DANIELS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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POINT I

Respondent's argument is predicated upon the same premise as the determination of the Courts below that, the author having failed to survive the renewal period, he could not effectuate any disposition of a right which never came into being. Such theory has been rejected by this Court.

In expounding this theory the respondent says (pp. 7, 8) "The author, during his lifetime, has only a contingent interest in the renewal rights, • • • which is dependent

upon his survival into the last year of the original copyright term. • • • This is also the prevailing view among text writers (citing 'Ball, Law of Copyright and Literary Property' and 'Ladas International Protection of Literary and Artistic Property') and it is the basis upon which the Courts below held that Ben Black's death prior to the commencement of the 28th year of the original period of copyright terminated his interest in the renewal, • • • ."

The District Court said "In the light of the policy of the act with respect to renewal rights 'expectancy' means that any right to renewal which the author may have is entirely contingent upon the author's survival until the commencement of the twenty-eighth year" (likewise citing Ball and Ladas, *supra*; R. 29, 32). Both Ball and Ladas took the same position that, prior to the accrual of the right of renewal, the author cannot make any disposition thereof either by assignment or bequest.

Thus Ball says (p. 557), in speaking of an author's disposition of a renewal expectancy, either by assignment or will:

> "One cannot grant personal property in which he has no existing title or vested right. Consequently an expectancy in or growing out of property cannot be the subject of an assignment at law, or of a valid mortgage sale; nor be devised by will."

Ladas says to the same effect (p. 773) "The author cannot dispose of rights he may never have."

In *Fox Film Corporation* v. *Knowles*, 274 Fed. 731 (D.C.E.D.N.Y.), affd. 279 Fed. 1018 (Cir. 2), rev. 261 U. S. 326, 43 Sup. Ct. 365, the determination of the District Court (pp. 733, 734) was on the same premise, that the author having failed to survive the renewal period any disposition made by him of the renewal, either by assignment or bequest, was ineffective because he had nothing

to leave. In this respect the District Court said (p. 734) that the author having died prior to the renewal period "He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived."

The Court of Appeals affirmed the decree of the District Court, on the authority of its prior determination in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909, cer. den. 262 U. S. 758, 43 Sup. Ct. 705. In that case the determination of the Court of Appeals was predicated upon the same premise as respondent's argument and the determination of the Courts below in the instant case, that the author having failed to survive the renewal period could not effect any disposition, whether by assignment or bequest, of a right which never came into being. The Court of Appeals said to such effect (p. 913) that while "what may be assigned could ordinarily be devised," the author having failed to survive the renewal period he "had as yet nothing to leave," but that if the author had lived to within such period he may "exercise his right to assign it, or bequeath it."

Upon the appeal to this Court the respondent in the *Fox Film* case likewise advanced the identical argument as the respondent herein (p. 327) that "neither the author nor his assignee possesses any right or power that may be transferred to run beyond a period of 28 years. . . . This new property right (renewal) however, does not come into being until the beginning of the last year of the original copyright. Not until then has the author any estate or right."

This Court determined to the contrary (p. 330):

> "We should not have derived that notion from the section, which seems to us to have the broad interest that we have expressed, and the words specially applicable seem to us plainly to import that if there is

no widow or child the executo. may exercise the power that the testator might have exercised if he had been alive."

It will be noted that the determination of this Court was not confined to the author's disposition by bequest, but on the contrary was in refutation of the broad argument there advanced, as here, that the author having failed to survive the renewal period, he could not make any disposition of a right of which he was never possessed.

The respondent recognizes (p. 11) that the theory adopted by the Court of Appeals in the *Silverman* case, upon which the argument of the respondent in this court in the *Fox Film* case was predicated, and upon which premise the respondent bases its argument herein, "is inconsistent with the decision of this Court in the Fox Film case." Petitioner in its brief (p. 9) quotes from the aforesaid determination of this Court in the *Fox Film* case, "that if there is no widow or child the executor may exercise the power that the testator might have exercised if he had been alive." However, respondent would reject such holding of this Court, as being contrary to the "underlying concept of Judge Bryan's opinion," in saying (pp. 13, 14), "Petitioner's argument that" (if there is no widow or child) "an executor might exercise the same power that the testator could have exercised if he had been alive does not recognize the underlying concept of Judge Bryan's opinion, which is that the decedent did not own any assignable property, because the contingent future interest granted to him by Congress was terminated by his death prior to the vesting of the right."

In *Gibran* v. *Alfred A. Knopf, Incorporated*, 153 F. Supp. 854 (D.C.S.D.N.Y.), affd. 255 F. 2d 121 (Cir. 2), cer. den. 358 U. S. 828, 79 Sup. Ct. 46, it was likewise contended (pp. 859, 860) that, as the author's contingent interest was terminated by his death prior to the vesting of the

right, his sole right under the statute was "to name an executor to apply for renewal." The District Court, in basing its determination upon the holding, *supra*, of this Court in the *Fox Film* case, said (p. 860):

> "The contended for construction would deprive an author, if he died without surviving spouse or children, of the right to dispose of renewal copyrights, contrary to congressional intent."

POINT II.

There is no foundation for respondent's argument that the rights of the executor being derived solely from the statute and independent of any rights of the author, in the same category as those of the widow, children and next of kin, they cannot be defeated by any act of the author.

In an attempt to circumvent the argument under "Point I" of its brief that if the author does not survive the renewal period he cannot effectuate any disposition, either by assignment or devise, of a right which never comes into being, respondent contrives the groundless theory that the rights of the executor are derived solely from the statute and independent of any rights of the author.

The respondent says to this effect (p. 11) that the rights created by the statute are "owned" by the executor and other persons specified; (p. 11) that the opinion of Judge Bryan is based upon the concept "that the renewal rights of the widow, child, executor, or next of kin exist independently of the author's rights"; (p. 13, quoting from Judge Bryan's opinion) that the statute "does not differentiate between rights which it vests in the widow and the children, the executor and the next of kin successively," as there "is nothing in the statute indicating that the rights of the executor are any different

from those other persons named therein"; and (p. 14, quoting from Judge Bryan's opinion) that "as no such right exists apart from the statute, the right cannot be taken away unless the statute expressly so provides."

This contention of respondent is the same as raised by it in the District Court. As Judge Bryan said in his opinion (R. 28) "Defendant contends that since the designated persons, including the executor, derive their interest solely and directly from the statute, the author may not, by prior assignment, deprive any of them of the rights which the statute expressly grants them."

In accord with this contention, the District Court held (R. 32), "I conclude that the executor has the same rights under the statute as the widow and children or next of kin. His right to renew is completely independent of what the author's rights were at the time of his decease." This holding was adopted by the majority of the Court of Appeals (R. 36).

Only the widow, widower, or children, or in the absence of a will the author's next of kin, "derive their interest solely and directly from the statute" and "completely independent of what the author's rights were at the time of his decease." In *De Sylva* v. *Ballentine*, 351 U. S. 570, 582, 76 Sup. Ct. 974, this Court, in noting that the only restraint under § 24 upon an author's right to "assign" his renewal interest was for the protection of his widow and children, said "Since the author cannot assign his family's renewal rights, § 24 takes the form of a compulsory bequest of the copyright to the designated persons."

The renewal rights are not "owned" by the executor, as respondent would contend (p. 11), nor are the same rights "vested" in the executor as in the widow, children, and next of kin, as held by Judge Bryan (R. 29). As Judge Washington said in his dissenting opinion (R. 38, 39),

while the statute includes the executor in the class of persons entitled to apply for the renewal, this "cannot mean that Congress intended the executor to take personally and beneficially, as in the case of a widow and child. 'The executor represents the person of his testator' . . . Fox Film Corp. v. Knowles, 261 U. S. 330."

The executor certainly does not derive his interest "solely and directly from the statute" and "completely independent of what the author's rights were at the time of his decease." It was only by virtue of the author's rights at the time of his decease, in the absence of a wife or children, that the executor was designated by him to effectuate the disposition of his renewal interest, *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U. S. 643, 655, 63 Sup. Ct. 773. Respondent defeats its own argument (p. 12) when, in speaking of the significance of the "Congressional intent" in enacting the renewal provision, it quotes from the opinion of the District Court in *Gibran* v. *Alfred A. Knopf, Incorporated, supra* (pp. 857, 858), wherein the court refers to the House Committee report which specifically expressed the intention of § 24 (former § 23) "to permit the author who had no wife or children to bequeath by will the right to apply for the renewal." Accordingly, the executor could not possibly take office or function, independent of the author's rights at the time of his decease.

The respondent says in conclusion (p. 19), "The statute does not distinguish between (1) the widow, children and next of kin, who take the renewal free of any assignment by the author during his lifetime, and (2) the persons for whose benefit the executor acts." The assignee, as well as the beneficiaries, take through the author, and the executor, in the absence of a widow or children, is merely a conduit for effecting the author's disposition of the renewal interest. For, as this Court said in the *Fox Film* case, *supra*, if there is no widow or child "The executor represents the person of his testator."

As Judge Washington said in his dissenting opinion (R. 39) "For example, if the testator left no widow or child, and had not previously assigned his renewal rights, he could properly bequeath these rights to a friend, and the executor could effectuate the bequest. But the testator here had nothing in actuality to bequeath. He had assigned his renewal rights, and his next of kin had assigned theirs. In equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out—a contract which was clearly 'valid and enforceable' under the Fisher case" (*Fred Fisher Music Co.* v. *M. Witmark & Sons, supra*).

POINT III

Respondent argues that all assignees of future renewal rights must accept the risk that such rights can be defeated under the purview of the statute by virtue of possible changes in circumstances as to what persons will constitute the widow and/or children of the author. However, this does not justify respondent's contention that an author, having no widow or children, has the power to nullify his own prior assignment.

In support of this argument respondent says (pp. 16, 17) "If an assignment of renewal rights is obtained prior to the vesting thereof, the assignee's rights can be and often are defeated by the applicable language of the statute to changing and unpredictable circumstances" since petitioner "could not have assurance that it would acquire the renewal copyright because of possible changes in circumstances as to what persons will constitute the widow and/or children of the author."

How can this possibly justify the author's defeating his own assignment? The respondent fails to point to anything in the language of the Act, or in the history of its

enactment, to indicate any intention on the part of Congress to give the author himself the power to nullify his own prior assignment.

As Judge Washington said in his dissenting opinion (R. 36, 37):

> "In his opinion below, Judge Bryan recognizes that it may be 'incongruous to allow an author who has no widow or children to defeat his prior assignment by executing a will, the terms of which are in derogation of the assignment * * *' 158 F. Supp. 188, 194 (S.D.N.Y. 1957). In my view, such a result is not only incongruous but without legal justification."

CONCLUSION

Petitioner respectfully submits that the judgment should be reversed.

Dated: New York, N. Y., January 28, 1960.

Respectfully submitted,

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